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Policing, Profiling and Discrimination Law: US and European Approaches Compared.

By Aaron Baker* and Gavin Phillipson**

I. Introduction

Counter-terrorism officials in the United States and the United Kingdom, arguably the two most significant Western protagonists in the “War on Terror,” responded to the events of September 11, 2001 and July 7, 2005 with an increasing resort to the use of “intelligence-led policing” methods such as racial and religious profiling.¹ “Intelligence-led policing” includes a number of unobjectionable and obvious techniques such as the use of tips, informants, and surveillance to identify individuals engaged in, or preparing for, criminal activity. However, it also seems to carry the implication that if the police have information suggesting that a terrorist act is more likely to be committed by, say, an Asian than a non-Asian, it is not discrimination to subject individual Asians to more “policing” than individual non-Asians. Reliance on intelligence, to the effect that most people who commit a certain crime have a certain ethnicity, can lead to less favourable treatment of an individual with that ethnicity because of his membership in that group, not because of any act he is suspected or known to have committed. If counter-terrorism officers decide not to detain, search, and question a white man, but instead to detain, search, and question a similarly situated, attired, and accoutred Arab man because he is Arab, the credo of intelligence-led policing means that the officers will not consider themselves to have used ethnicity as a criterion for police attention, but to

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¹ Daniel Moeckli, *Discriminatory Profiles: Law Enforcement After 9/11 and 7/7*, 5 EUROPEAN HUMAN RIGHTS L REV 517 (2005).

have relied on the extent to which the individual matches an intelligence estimate that has Arab men as more likely perpetrators of the particular kind of crime under investigation. The “intelligence” is not about the individual—the police will generally have only one relevant piece of intelligence about a stopped-and-searched individual: his apparent ethnicity—and yet the state will claim that it did not stop the individual because of his race, but because of their “intelligence.”

This legerdemain offers a stern test of protections against state discrimination, in that it can exploit a superficial jurisprudential conception of discrimination as something that is done, rather than something that is experienced.² US constitutional anti-discrimination protections, for example, will not recognise differential treatment as discrimination unless the “perpetrators” have been shown to *intend* to impose less favourable treatment on people of a certain race.³ Moreover, from the perspective of police services with few other ideas of how to cope with the amorphous threat posed by international terrorism, the use of “intelligence” to justify a stop and search or detention can arguably represent what lawyers term a “least restrictive alternative”, that is, a course of action that, of the various choices available, is the least damaging to the suspect group’s constitutional rights. This is significant because both US and European protections against government discrimination allow the fact that a given method is the least harmful one available to weigh in favour of finding differential treatment justified, and hence legal. The same laws should, but often do not, give a comparable weight to the fact that the same method, to those stopped, searched or detained, can feel not only arbitrary, but over-broad – in the sense that it captures many entirely innocent citizens –

² Aaron Baker, *Comparison Tainted by Justification: Against a “Compendious Question” in Article 14 Discrimination*, [2006] PUBLIC LAW 475 (hereinafter “*Comparison*”); Aaron Baker, *Article 14 ECHR: a Protector, Not a Prosecutor*, in JUDICIAL REASONING AND THE HUMAN RIGHTS ACT 1998 (Helen Fenwick, Gavin Phillipson, & Roger Masterson eds; (Cambridge University Press 2007) (hereinafter “*Protector*”); Albert W. Alschuler, *Racial Profiling and the Constitution* 2002 U CHI LEGAL F 163, 184 (2002).

³ See, eg, *Washington v Davis*, 426 U.S. 229, 239 (1976); *Brown v City of Oneonta*, 221 F3d 329, 337 (2d Cir 2000); *United States v Travis*, 62 F3d 170, 174 (6th Cir 1995); *United States v Weaver*, 966 F2d 391, 394 n 2 (8th Cir 1992), cert denied 506 US 1040 (1992).

and under-inclusive – in that it may fail to catch dangerous individuals who do not fall into the suspect racial category.

The Chief Constable of the British Transport Police, in the wake of the July 7, 2005 bombings in the London Underground, put the state position on the subject succinctly:

Intelligence-led stop and searches have got to be the way ... We should not waste time searching old white ladies. It is going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups.⁴

The position of those young, male Asians might be put just as succinctly: whatever their reason for doing it, the police systematically treat us worse than white people, in a stigmatising way, and the law should offer some kind of meaningful protection against that.⁵

In light of the challenges that intelligence-led profiling poses to provisions against government discrimination, this paper discusses the extent to which, and why, such protections must incorporate a protective, or effects-based, definition of discrimination, coupled with a requirement of proportionate action. Article 14 of the European Convention on Human Rights (“ECHR”),⁶ as applied in the UK through the Human

⁴Vikram Dodd, *Asian Men Targeted in Stop and Search*, *GUARDIAN UNLIMITED* (August 17 2005) at <http://www.guardian.co.uk/attackonlondon/story/0,16132,1550470,00.html> (last checked August 8 2006).

⁵ This principle was recently recognised by the European Court of Human Rights in *Gillan and Quinton v United Kingdom* (2010). The ECtHR found that a UK stop and search power authorised by the Terrorism Act 2000 was not “in accordance with the law”, noting the absence of any safeguards against racial targeting or restrictions to ensure proportionality in its application.

⁶ Article 14 provides: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

Rights Act 1998 (“HRA”),⁷ will serve as an example of a provision which has a greater potential to exhibit such characteristics in a counter-terrorism context than does the Equal Protection Clause of the 14th Amendment to the US Constitution.⁸ This paper sets out two key contentions. First, we argue that Article 14 ECHR has a more protective, and less “prosecutorial,” conception of discrimination than has the Equal Protection Clause (“EPC”), meaning that judges need not find a discriminatory *motive* to find that discrimination has occurred. Second, we contend that Article 14 provides the judiciary with the key tool of proportionality, which, when properly applied, makes it harder for discrimination to stand up to scrutiny.

The argument set out in this paper, and the comparison employed to support it, focuses exclusively on the work that can be done by constitutional (or in the ECHR context quasi-constitutional) anti-discrimination provisions. It makes no empirical claims about the relative effectiveness of US and UK law in dealing with racial profiling or intelligence-led policing. It also falls outside the scope of this paper to examine, for example, statutory, regulatory, or soft-law approaches to dealing with profiling. It is concerned instead with what kind of constitutional equality jurisprudence has the best chance of subjecting profiling practices to judicial scrutiny. To this end, Section II below explains the context in which intelligence-led policing flourishes, and how this discussion contributes to the profiling debate in both the US and the UK. Section III introduces the Article 14 analysis and sets out its strengths in comparison to the EPC. Section IV argues for a particular approach to the application of Article 14 proportionality to profiling, a practice with which Article 14 has yet to grapple in the UK. Finally, Section V will illustrate the impact an Article 14-style analysis would have on EPC jurisprudence by subjecting US cases to Article 14 scrutiny.

We turn first to the context: the threat of global terrorism and the pre-emptive security policy that has emerged to deal with it. The purpose of this discussion is firstly to

⁷ The Human Rights Act is a statute which gives effect in UK domestic law to the UK’s international law obligations under the ECHR. See below at 00-00.

⁸ This provides, as relevant: ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’

explain how “intelligence-led policing” is related to the particular nature of the risk represented by terrorism and the perception of that risk by policy makers and the public; secondly, we seek to point out how the disproportionate fear generated by the terrorist threats can lead both policy-makers and the public to disregard traditional civil libertarian safeguards for suspect individuals, making the role of the judiciary of particular importance in this area.

II. The Context of the Debate about Intelligence-Led Policing and Profiling

In the age of the ‘war on terror,’ we are increasingly told by governments and some commentators⁹ that we live in a state of exceptionalism. The risks posed by international jihadist terrorism are said to be of a different order from those previously encountered. As Tony Blair put it, ‘the rules of the game are changing:’¹⁰ not only, we are told, do we face a different order of threat, but our response must be prepared to put aside traditional constraints upon the ability of the executive branch to protect us – constraints represented by human rights norms, in particular the rights to liberty and a fair trial. The UK response to this threat has consisted of a torrent of anti-terrorist measures, starting with the Act of 2000 – five major Acts in six years. A similar phenomenon may be seen in numerous other jurisdictions: for example even though Australia has suffered no attacks on its soil in the last twenty years, the previous Howard Government secured the passage of no less than 44 separate anti-terrorism statutes between 2002 and 2007.¹¹

The nature of this response is of course strongly linked to the particularly amplified public and governmental response to the risk of terrorist attacks. As Victor Ramraj puts it, “...all too often, policy responses are motivated by a widespread public

⁹For prominent examples, see B. Ackerman, *BEFORE THE NEXT ATTACK. PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006); A. Derzhovitz, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002).

¹⁰ PM’s Press Conference—5 August 2005: www.pm.gov.uk/output/Page8041.asp

¹¹ For an excellent, brief guide to the remarkable proliferation of anti-terrorist legislation in Australia in recent years, see A. Lynch and G. Williams, *WHAT PRICE SECURITY? TAKING STOCK OF AUSTRALIA’S ANTI-TERROR LAWS* (2006, UNSW press).

misperception of risk and a heightened collective sense of fear and vulnerability that call into question our ability to think clearly about policy options”.¹² Studies of risk perception indicate that people do not on the whole assess levels of risk objectively,¹³ being heavily influenced by recent disasters,¹⁴ peer perceptions - in particular so called ‘risk amplification’ in the media¹⁵ - and are prone to over-reacting to risks represented by dramatic and unfamiliar events or causes.¹⁶ Thus the massive response to the 52 deaths caused by terrorist attacks in the UK in the last decade dwarfs the low-key continuing concern generated by the 21,000 deaths on the roads in that period.¹⁷ The same could be said but even more strongly about the extraordinarily far-reaching US response to 9/11 itself.

Such responses are partly explicable because the strong emotions generated by terrorist attacks leads to the phenomenon termed “probability neglect”, whereby people focus upon “the terrible consequences if risks were to re-materialise, rather than the remote risk that they will”.¹⁸ Hence, “worst case scenarios have a habit of migrating from the realm of fantasy to the domain of policy deliberation”.¹⁹ Thus the insecurity created by terrorist attacks, their reportage in the media, and at times by governmental rhetoric creates what Conor Gearty terms “the risk-obsessed society.” Indeed, ironically, “The intense sense of powerlessness which accompanies the consciousness of ignorance about

¹² V. Ramraj, *‘Terrorism, risk perception and judicial review’* in K. Roach, M. Hor and V. Ramraj (eds) *GLOBAL ANTI-TERRORISM LAW AND POLICY* (Cambridge: CUP, 2005), 107. We are indebted to his summary of Sunstein’s research in what follows.

¹³ See generally C. Sunstein, *“Terrorism and Probability Neglect”* (2003) *THE JOURNAL OF RISK AND UNCERTAINTY* 121.

¹⁴ This is known as “the availability heuristic”: *ibid.*

¹⁵ R. Kasperson et al, *“The Social Amplification of Risk: a Conceptual Framework”* in P. Slovic (ed) *THE PERCEPTION OF RISK* (2000) 232-45

¹⁶ *Ibid* at 122.

¹⁷ On average, around 3,000 people are killed on the roads in the UK annually, giving a total of 21,000 between 2001 and 2008. See National Statistics Online: www.statistics.gov.uk/cci/nugget.asp?id=1208.

¹⁸ Kasperson, *supra* note 15 at 122.

¹⁹ Furedi, *INVITATION TO TERROR: THE EXPANDING EMPIRE OF THE UNKNOWN* (London, Continuum, 2007), 114.

the future works to empower terrorism””.²⁰ This sense of insecurity leaves a democracy highly vulnerable to what Phillip Pettit terms “the politics of passion”, in which politicians represent themselves as the only group *really* concerned about public fears, simultaneously amplifying them, and asserting that they hold the only solutions – more and tougher legislation.²¹ As Victor Ramraj puts it,

“the dysfunctional nature of populist democracy is especially pronounced in a fearful and emotionally-charged atmosphere in which judgments about risk are likely to be distorted, resulting in ill-conceived, hastily enacted laws that unnecessarily restrict individual freedom.”²²

Not only is the new legislation often hastily enacted and driven by fear – that fear has also changed the legislation’s aim and method. The key characteristic of much new anti-terrorism legislation is its shift away from the criminal justice model of punishing committed offences through the ordinary criminal courts to a strategy of pre-emption: measures are taken against individuals based upon an assessment of the risk they pose, in other words of their *likely future* conduct. Lucia Zedner refers to this as a move towards a ‘pre-crime society’ based on the ‘logic of security’, which has started to overshadow the ‘post-crime orientation of criminal justice’.²³ In other words, we have a shift from a post-crime system, based on criminal offences, proof and punishment, to a pre-crime society, based on risk-assessment, suspicion and pre-emption. As David Dyzenhaus has put it:

“The potentially horrific outcomes of terrorist action are seen to mandate a pre-emptive or preventative response reflective of ‘a new and urgent emphasis upon

²⁰ C. Gearty, *The Super-Patriotic Fever of the Moment*” (2008) OXFORD JO LEG STUD 1 at 17, quoting Furedi, *supra* note 19 at 66.

²¹ Ramraj, *supra* note 12, at 113.

²² *Ibid*, 119.

²³ L. Zedner, *Pre-crime and post-criminology?* (2007) 11 THEORETICAL CRIMINOLOGY 261 at 261-62.

the need for security, the containment of danger, the identification and management of any kind of risk.’’²⁴ ‘

This emphasis on prevention is then legally manifested in “control” measures, directed towards acts in the future rather than events in the past.²⁵ Examples include: the establishment of the detention facility at Guantanamo Bay;²⁶ the powers to detain foreign terrorist suspects indefinitely without proof of commission of actual offences introduced in the UK by Part IV of the Anti-Terrorism Crime and Security Act 2001; ‘Control Orders’, under the Prevention of Terrorism Act 2005 Act, also introduced in Australia into Division 104 of the *Criminal Code* (Cth), powers of detention for investigatory²⁷ and preventive purposes²⁸ in Australia and the power to detain non-citizens in Canada on grounds of risk to national security,²⁹ recently declared unconstitutional by the Canadian Supreme Court;³⁰ the use of racial profiling in stop and search under anti-terrorism powers in the UK and USA. As Zedner puts it:

The urge to avert the risks posed by the growth of terrorist activity has generated an emerging genre of preventive justice. Standing outside the criminal process

²⁴ D Dyzenhaus and R. Thwaites, “*Legality and Emergency – the Judiciary in a Time of Terror*” in A. Lynch, E MacDonald, G. Williams, *LAW AND LIBERTY IN THE WAR ON TERROR* (2007) at 17, quoting D Garland, *THE CULTURE OF CONTROL – CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (OUP 2001), 12.

²⁵ Dyzenhaus and Thwaites, *ibid* at 17-18.

²⁶ Even though the Obama administration is seeking to close the Guantanamo detention facility, it has indicated that there may be some individuals that it regards as too dangerous to release, but who it considers cannot be prosecuted in the ordinary courts, who must therefore be subject to long-term detention without trial; see Obama stands firm on closing Guantánamo’ *Guardian* 21 May 2009.

²⁷ E.g. under the Australian Security Intelligence Organization Legislation Amendment (Terrorism) Act 2002, allowing the Australian security services to detain people for questioning about terrorism related activity.

²⁸ Under Division 105 of the *Criminal Code*.

²⁹ Immigration and Refugee Protection Act, S.C. 2001, c. 27.

³⁰ *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350.

and the ordinary protections of the criminal law, preventive justice operates pre-emptively in the name of public protection.³¹

These pre-emptive measures, which dramatically restrict the rights of members of the suspect group on the basis of an assessment of what they intend, or are seeking to do, are thus particularly pernicious; Amnesty International has described such legislation as amounting to a “sustained attack” upon human rights in the UK, as part of the “war on terror.”³² Its significance is all the greater because of the well-known tendency of “temporary” or “emergency” powers to become permanent,³³ and of the tendency of “extraordinary” measures, originally introduced to combat the special threat from terrorism, to colonize the regular criminal law.³⁴ Examples include the erosion of the right to silence,³⁵ the police power to stop and search within a designated area without reasonable suspicion³⁶ and powers of extended detention before charge.³⁷ Control orders for terrorist suspects were introduced only in 2005, but the Government has already floated the idea of Serious Crime Prevention Orders - a modified control order - to be used against drug-dealers, people traffickers and fraudsters.³⁸ Moreover, the use of Special Advocates³⁹ has spread rapidly. As a recent commentary noted, “Originally

³¹ L. Zedner, “*Preventive Justice or Pre-Punishment? The Case of Control Orders*” (2007) 60 CURRENT LEG. PROBS. 174.

³² (02/11/2005) <<http://news.amnesty.org/mavp/news.nsf/>>.

³³ As occurred when previously “temporary” anti-terrorism laws passed in the UK from 1974 on with the Prevention of Terrorism (Temporary Provisions) Act 1974, were made permanent in the 2000 Terrorism Act, even though by then the IRA threat was over.

³⁴ R. Austin, “*The New Constitutionalism, Terrorism and Torture*” (2007) 60 CURRENT LEG. PROBS. 79.

³⁵ Originally found in Northern Ireland anti-terrorism laws, but later transplanted into ss 34–37 of the Criminal Justice and Public Order Act 1994.

³⁶ Now found in s 60 Criminal Justice and Public Order Act 1994.

³⁷ First found in Prevention of Terrorism (Temporary Provisions) Act 1974, and then adopted into the Police and Criminal Evidence Act 1984, Part IV.

³⁸ Home Office, *New Powers Against Organised and Financial Crime*, Cm 6875, 2006). www.homeoffice.gov.uk/documents/cons-2006-newpowers-org-crime/.

³⁹ These are security-cleared barristers whose function is to challenge, on behalf of suspects, secret, incriminating evidence which the state refuses to disclose to the suspect.

intended for a mere handful of deportation cases each year, [Special Advocates] are now used in Parole Board Hearings, asset-freezing cases, some employment hearings and immigration cases, and certain special Tribunals concerned with anti-terrorism powers.”⁴⁰ The Chair of the Parliamentary Joint Committee on Human Rights has noted that special advocates and secret evidence ‘are now used in 22 different types of legal proceedings in the UK.’⁴¹ As Zedner puts it: “The less demanding procedural protections attached to exceptional measures infiltrate and transform the mainstream criminal process with alarming speed.”⁴²

The courts are the crucial forum in which this galloping exceptionalism, fear-mongering, and rights-trammeling should encounter forensic challenge; however, they have remained in many respects fairly deferential to the executive and Parliament in this area. As a result, in the view of many commentators, judicial scrutiny has been neither as structured nor as intense as it should be⁴³ – a point we will return to. More disturbing is the fact that *despite* this deference, the limited assertiveness that the courts have shown has led to strong tensions between judiciary and executive – and has taken place in the context of, and seemingly apparently contributed to, an apparent rising hostility towards the notion of human rights in contemporary British political culture. Members of the last UK Government were not slow to condemn judges for undermining counter-terrorism or crime-fighting efforts by (as they saw it) elevating the abstraction of rights over the reality of security;⁴⁴ hence Tony Blair’s proposal when Prime Minister to amend the

Special Advocates thus seek to assist their clients, but are forbidden from discussing the evidence in question with them. They thus represent a severely attenuated form of due process.

⁴⁰ E. Metcalfe, “‘Representative but not responsible: the use of special advocates in English law’” (2004) 2 JUSTICE JOURNAL 11, 33.

⁴¹ HC Deb 1 March 2010, col. 739 (Andrew Dismore).

⁴² *Surpra*, n 31, 201.

⁴³ Keith Ewing, “*The futility of the Human Rights Act*” [2004] PUB LAW 829; Austin, n 34 *surpra* at, 98-117.

⁴⁴ Tony Blair described the decision of Sullivan J in the Afghan hijackers case (*R (S) v Secretary of State for the Home Department* [2006] EWHC 1111) as “an abuse of common sense”; Austin notes (*surpra* note 34 at 111) that his decision was subsequently upheld as “impeccable” by the Court of Appeal: [2006] EWCA Civ 1157, para 50. John Reid, when Home Secretary said to Parliament in 2007 that, ‘We wanted to deport

Human Rights Act so as to require a ‘balance between the rights of the individual and the rights of the community to basic security’⁴⁵ a theme that was echoed and amplified in plans by the Conservative Party when in opposition for a new Bill of Rights.⁴⁶ In the US, Senator John McCain made an extraordinary attack upon the decision of the US Supreme Court decision in *Boumediene v Bush*, which restored to Guantanamo Bay detainees the right of habeas corpus, describing it as “one of the worst decisions in the history of this country”.⁴⁷

These tensions between executive and judiciary then become part of the wider disenchantment with the notion of human rights - and the HRA specifically – just referred to. As Lazarus and Goold put it, “Since 9/11, the words “security” and “human rights” have, in the collective imagination, now come to connote an almost insuperable opposition.”⁴⁸ When the public are told that they live in an age of terror, rights are very easily portrayed as “a gamble with people’s safety”.⁴⁹ These “irresponsible rights”, which endanger the safety of the majority, are then counter-posed with the “forgotten” or “neglected” rights of the decent, law-abiding majority to live in peace and safety. The “wrong” kind of rights, rights for *them* (the other), are then easily portrayed as “a conspiracy against common sense and practical wisdom”, conjured up by a liberal, effete,

foreign terrorist suspects, but were prevented from doing so by the courts’ interpretation of article 3 of the ECHR and particularly by the *Chahal* judgment, an outrageously disproportionate judgment stating that we cannot deport a terrorist suspect if there would be any threat to him if he were sent abroad’ (HC Deb 24 May 2007, col 433); this view also lay behind Tony Blair’s repeated calls for a “profound rebalancing of the civil liberties debate” *Guardian* 15 May 2006.

⁴⁵ Blair in a letter to John Reid on his taking office as Home Secretary. ‘Revealed: Blair attack on human rights law’ *The Observer* (14 May 2006).

⁴⁶ See e.g. the Speech by the then Shadow Justice Secretary, Edward Garnier, to the Bar Association, ‘Can the Bill of Rights do Better than the Human Rights Act?’ 30 November 2009.

⁴⁷ <http://elections.foxnews.com/2008/06/13/mccain-guantanamo-ruling-one-of-the-worst-decisions-in-history/>

⁴⁸ B. Goold and L. Lazarus, *Introduction*, in B. Goold & L. Lazarus, *SECURITY AND HUMAN RIGHTS* (Oxford: Hart Publishing, 2007), 1.

⁴⁹ I. Loader, “The Cultural Lives of Security and Rights” in Goold and Lazarus, *ibid*, 39.

and - from the little-Englander perspective - European-loving elite.⁵⁰ Human rights are thus cast as elitist, narrow and selfish, and even archaic, in the face of a threat to our lives and whole way of life. As Loader succinctly puts it: “When rights are discursively made to carry such risks, it is little wonder that security so often trumps them.”⁵¹

In this kind of atmosphere, it is of crucial importance that the constitutional constraints on coercive state powers, especially those intended to protect “them”—the minority “other”—have the strength to impose real obstacles to the fearful will of majoritarian pro-security opinion. Contrasting the US and UK constitutional approaches to protecting against government discrimination provides illustrations of the two dominant models for constraining majority targeting of ethnic or religious minorities. The US side represents the *prosecutorial* model: a constitutional provision that seeks only to prosecute intentional mistreatment, and only when that mistreatment could have been avoided without undermining the achievement of the state objective. The UK side of the comparison shows the *protective/proportionate* model—or at least the potential for it—which recognises discrimination as the *experience* of distinct treatment, regardless of motive, and allows it only when the burden on the minority is proportionate to the benefits to the society.

Racial and religious profiling in counter-terrorism efforts furnish illustrative examples of the kind of intelligence-led, proactive measure that might satisfy the US model, but should nevertheless fail a proportionality assessment under Article 14 ECHR. We do not develop a detailed definition of “racial and religious profiling,” because our analysis is concerned less with the nature of the phenomenon than with approaches to controlling instances of it.⁵² It should suffice to state that we will discuss how Article 14

⁵⁰ *Ibid*, 40. See for example, the “Leader” in *The Sun*, the best-selling tabloid newspaper in the UK, on 15 May 2006: “At last Tony Blair admits he needs to do something about the ludicrous Human Rights Act. He wants the Government to have the power to overturn judges' barmy rulings where a criminal's so-called rights come ahead of their victim's. The PM says this is one of his 'most urgent policy tasks'. He's not kidding... Rest assured, *The Sun* will continue to fight for the scrapping of this disgraceful piece of legislation.”: www.thesun.co.uk/article/0,,2-2006220181,00.html

⁵¹ *ibid*, 36.

⁵² See, eg, The legal literature offers several efforts at defining profiling, and it tends to fall into one of two camps: (1) those who think that using a description of an alleged

and the EPC would deal with situations where government law enforcement efforts, either in the form of general policies or individual decisions by law enforcement agents or police, employ race or religion as an outcome-determinative factor in deciding whom to stop, search, question, arrest, detain, or investigate.⁵³ “Outcome-determinative” refers to the fact that profiles can include race or religion as one of several factors, but if the profile works in such a way that a person who meets all of the criteria other than the profiled race will not, e.g. be stopped and searched, but a person who meets the other criteria *and* race will do, this is disparate treatment on the ground of race, and hence *prima facie* discrimination. We emphasise that this is *prima facie* discrimination, because we do not assume that there is anything unlawful or even unethical about it, simply that it technically involves distinct treatment of individuals who differ solely in their race; this only becomes unlawful and open to criticism if it lacks an objective justification as defined according to the relevant constitutional provision.

Although the “classic” profiling scenario involves preventive policing, where a profile is used to narrow the field of targets in efforts to identify terrorists before they

perpetrator to justify stopping or searching only people of the race described is by definition justifiable and not profiling, see R. Richard Banks, Essay, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1202–04 (2004); Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1202–07 (2003); and (2) those who see profiling as including any use of race as a criterion for police attention, see AM. CIVIL LIBERTIES UNION, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11, at 3 (2004); Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 11 n.6 (2003); Harcourt, *supra* note 54, at 1345; Kent Roach, *Making Progress on Understanding and Remediating Racial Profiling*, 41 ALTA. L. REV. 895, 896, 900 (2004).

⁵³ This is a definition similar to the one set out in Stephen R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUMBIA L REV 1413, 1415 (2002), although they exclude race-focused investigations based on eyewitness descriptions of alleged perpetrators, because this does not involve a ‘global judgment about a racial or ethnic group as a whole.’ We prefer the approach urged by, among others, Bernard Harcourt (*supra* note 54) who argues that what is in the mind of the person who uses race as a criterion should be considered only as part of a justification for racially distinct treatment; a pure motive cannot change the fact that stopping only black people because the eyewitness claimed the perpetrator was black nevertheless involves stopping people because they are black.

commit acts of terrorism, we do not exclude situations where police use eyewitness descriptions of the apparent race or religious garb of the perpetrators of a specific crime. In such cases, viewed from the perspective of the stopped, searched, or detained individual, their race or religion was a determining factor in their being stopped, searched, or detained. The presence of intelligence data or an eyewitness account simply makes the profile arguably more reliable, and hence more susceptible to justification, but it does not change the *prima facie* discriminatory nature of the state action.⁵⁴ The *motive* of the state may simply be to focus attention on those who resemble the suspect, but the *means* of pursuing that motive is distinct treatment of some people because of their race or religion. Although, as discussed at footnote 52 above, there are some who would disagree with this definition, we choose to join those who support a broader definition, because a narrower definition excludes from constitutional scrutiny disproportionate reliance on eyewitness statements to justify extensive disparate treatment on the grounds of race or religion (see Section V below).

Two circumstances make profiling in counter-terrorism efforts particularly interesting for the purpose of this comparison. First of all, countering the threat of terrorism will almost always represent a compelling state interest,⁵⁵ that is, one that is legally capable of justifying discriminatory treatment. Second, terrorism presents such an elusive target for law-enforcement efforts that often it seems that the only effective actions the state can take must employ broad generalizations that impose burdens on specific groups (and consequently on society as a whole).⁵⁶ These facts mean that profiling can be defended on the ground that it pursues a compelling interest through a means as narrowly tailored as possible without forfeiting its law-enforcement effectiveness, which will strike many as an ethically or legally sufficient justification. However, accepting such a justification ignores the possibility that in some circumstances profiling will impose an individual, group, or societal burden that is so unacceptable that

⁵⁴ Bernard Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 CHICAGO L REV 1275, 1345 (2004).

⁵⁵ Alschuler, *supra* n 2 at 183-184.

⁵⁶ AMERICAN CIVIL LIBERTIES UNION, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 (1994).

the method should be rejected even in the absence of a “less restrictive alternative.” As discussed further below, this scenario would have a different fate under Article 14 than under the EPC. To demonstrate this, the next section provides a brief overview of how the EPC and Article 14 analyses work. Section IV will then make some arguments about how Article 14 should be applied under the HRA in the UK, and Section V will look at US profiling cases that got nowhere under the EPC, and assess how they would fare under the analysis we propose. In doing this we do not purport to offer up a fully developed legal model for analysing racial or religious profiling, but merely to begin a discussion about how a protective approach to controlling state discrimination, that requires any disparate treatment to procure benefits proportional to the individual and social costs imposed by it, can more effectively deal with profiling than a prosecutorial, one-sided scrutiny approach.

III. The Analysis under the EPC and Article 14

Under the US EPC, which purports to guarantee the “equal protection of the laws,”⁵⁷ it is only when a state measure or decision represents intentional discrimination on the basis of a “suspect classification” like race or religion that Supreme Court jurisprudence requires the application of strict scrutiny to that measure.⁵⁸ In the absence of strict scrutiny, measures very seldom violate the EPC, so a finding of discrimination on the basis of a suspect classification is a virtual necessity for a successful claim.⁵⁹ When the state impinges on a fundamental right or distinguishes on a basis that singles out a discrete and insular minority and thus engages in a “suspect classification,” the Court must apply “strict scrutiny.” A measure will satisfy strict scrutiny if it is “narrowly tailored to a compelling state interest.”⁶⁰ Prior to the 1970s, any other classification

⁵⁷ *Supra*, note 8.

⁵⁸ *See, e.g., Washington v Davis*, 426 U.S. 229, 239 (1976); *Brown v City of Oneonta*, 221 F3d 329, 337 (2d Cir 2000); *United States v Travis*, 62 F3d 170, 174 (6th Cir 1995); *United States v Weaver*, 966 F2d 391, 394 n 2 (8th Cir 1992), cert denied 506 US 1040 (1992).

⁵⁹ *Adarand Constructors, Inc v Pena*, 515 US 200, 237 (1995).

⁶⁰ *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986).

would satisfy the EPC as long as the distinction bore a rational relationship to a legitimate objective.⁶¹ In essence, the EPC protected against disparate treatment on illegitimate, irrational or purely arbitrary grounds, and adopted a presumption that distinctions inimical to a racial minority, or that restricted fundamental liberties, denied that protection.

By the 1970s, the “discrete and insular minority” underpinning fell away. This is not to say that the U.S. Supreme Court stopped considering it important that a distinction appeared to burden a group’s ability to participate politically but that insularity and minority status ceased to control whether the Court would view a classification as “suspect.” The Court began to view racial distinctions as intrinsically problematic for reasons beyond political participation, such that racial distinctions that burdened whites, like affirmative action, were also treated as suspect.⁶² National origin and alienage have also been found suspect without reference to minority status.⁶³ In 1976, responding almost certainly to a growing conviction that differential treatment of women and men created social problems rather than to a conviction that women were an insular minority that could not participate effectively in the political process, the Court declared that distinctions on the basis of gender are “quasi-suspect,” and must face “intermediate scrutiny.”⁶⁴ Intermediate scrutiny requires that a challenged law “substantially advance an important state interest.”⁶⁵ The Court subsequently applied this level of review to classifications based on illegitimacy.⁶⁶ The Court has declined to make sexual orientation, mental retardation, disability or age suspect or quasi-suspect classifications.

⁶¹*Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911), quoted in full in *Morey v. Doud*, 354 U.S. 457, 463-64 (1957); *FCC v. Beach Communications, Inc.*, 598 U.S. 307, 313 (1993).

⁶²*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-93 (1978).

⁶³*Graham v. Richardson*, 403 U.S. 365, 371 (1971). Religion is sometimes listed as a suspect classification but this remains controversial; religious discrimination often receives strict scrutiny on the ground that it invades the fundamental right to the free exercise of religion. *Employment Div. v. Smith* 494 U.S. 872 (1990).

⁶⁴*Craig v. Boren* 429 U.S. 190 (1976). The case dealt with a law that allowed women to buy beer at the age of eighteen, but required men to wait until the age of twenty-one. There was no suggestion that this law would impair the political participation of persons of either gender.

⁶⁵*Id.* at 197.

⁶⁶*Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

The analysis as it stands today begins by asking whether a challenged distinction rests on a suspect or quasi-suspect ground or burdens a fundamental right. Proving that a measure differentiates on a suspect or quasi-suspect basis requires showing not only that the law has the effect of distinguishing on, for example, the grounds of race or sex, but that it intends to have that effect.⁶⁷ Thus a stop-and-search profile that has the effect of stopping only persons of Middle-Eastern or South Asian ethnicity, but not whites, does not receive any heightened scrutiny if the state does not act under a motivation to distinguish on the basis of ethnicity, but instead acts under a motivation to target persons who satisfy an intelligence-based profile. If a challenged state action neither employs a suspect or quasi-suspect classification nor restricts a fundamental freedom, then “rational basis” review applies, calling only for the law to bear a rational relationship to a legitimate governmental purpose. If a measure distinguishes on the basis of gender or illegitimacy, it must substantially advance an important state interest, and if it classifies on the basis of race, national origin, or alienage, it must be narrowly tailored to a compelling state interest.

This last test focuses exclusively on the reasons for choosing the measure in question, not its impacts. It means that so long as the state interest pursued by a measure ticks the “compelling” box, and there is no obvious way to pursue the interest as effectively through a less intrusive means, then the measure complies with the Constitution, regardless of the extent of its negative impacts. This contrasts sharply with proportionality under the ECHR. Proportionality is the closest Convention analogy to the varying levels of scrutiny under the EPC, in that it represents the test for justification of *prima facie* unequal treatment. In the context of racial profiling the relevant comparison is between proportionality and the strict scrutiny that should apply to all cases of state discrimination on the basis of race. Unlike strict scrutiny, proportionality requires that a challenged measure not impose a negative impact that is disproportionate to the extent to which the measure advances a legitimate state interest.⁶⁸ Rather than simply looking at the quality of the state’s justification, proportionality thus represents a two-sided

⁶⁷ *Bradley v. United States*, 299 F3d 197 (3rd Cir 2002); 2002 U.S. App. LEXIS 14960 at 7.

⁶⁸ *A and Ors v Home Secretary* [2004] UKHL 56, para 50; *Ghaidan v Godin-Mendoza*, [2004] UKHL 30, para 133.

balancing approach, under which the extent to which the interest is compelling and the measure effective in pursuing it (the state's side of the balance) must outweigh the extent of the negative impact on rights interests (the claimant's side of the balance).

The first thing to note about Article 14 is that in one important way it offers a narrower scope of protection than the Equal Protection Clause. It does not protect against all discrimination by the state, but only against discrimination “in the enjoyment of the rights and freedoms set out in [the] Convention”.⁶⁹ That means that, before Article 14 can apply, the challenged measure must affect another Convention-protected right. Fortunately for this discussion, most racial and religious profiling in the context of counter-terrorism will engage either the right to liberty (Article 5), to privacy (Article 8), to free exercise of religion (Article 9), or to freedom of association (Article 11).⁷⁰ In other respects, however, Article 14 can apply more broadly than the EPC because it is “protective” as opposed to “prosecutorial.” In other words, Article 14 promises to *protect* residents of ECHR-signatory states from *experiencing* inequality of treatment; in contrast, a prosecutorial anti-discrimination provision like the EPC seeks to define “discriminatory conduct,” and focuses on whether a challenged measure was the product of such conduct. Article 14 attempts to identify unequal treatment resulting from state action—however motivated—and to put a stop to it if its impacts outweigh its benefits to society.

There is little “legislative history” of how the Council of Europe arrived at the particular formulation it adopted for Article 14 in 1950, but it is known that the penultimate version put up for debate read “The rights and freedoms defined in this Convention shall be protected without discrimination . . .”; the final version adopted, however, provided that “[t]he *enjoyment* of the rights and freedoms set forth in this Convention shall be *secured* without discrimination . . .” (emphasis added).⁷¹ This change meant that “instead of the obligations of the Contracting States, the position of the

⁶⁹ Supra, note 6.

⁷⁰ See, eg, Aaron Baker, *The Enjoyment of Rights and Freedoms: a New Conception of the ‘Ambit’ under Article 14 ECHR*, 69(5) MODERN L REV 714 (2006).

⁷¹ K J Partsch, *Discrimination*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (R St J Macdonald, F Matscher & H Petzold eds, 1993), 575.

individual concerned is placed in the foreground”.⁷² Had the provision stated that rights “shall be protected without discrimination”, the implication would have been that state actors must not *commit* discrimination when protecting Convention rights. However, since Article 14 was finally drafted as a guarantee that the state will “secure” the “enjoyment” of rights without discrimination, this suggests that Article 14 binds signatory states to see to it that state action does not abridge the equal enjoyment of Convention rights. This makes Article 14 a protector of equality, not a prosecutor of discriminatory conduct.

In the UK, Article 14 has domestic legal effect under the Human Rights Act 1998 (“HRA”), which makes the key ECHR rights directly enforceable against public authorities in UK courts. The courts are bound to apply Parliamentary statutes, but section 3(1) HRA requires judges, “so far as it is possible to do so” to read and “give effect” to all legislation and regulations in a way that is compatible with the Convention rights, even where a natural reading of the law would violate the Convention. Where a measure cannot be read in a Convention-compatible way without going against the manifest intent of Parliament, section 4 HRA requires that the court issue a “declaration of incompatibility,” meaning that the court will apply the statute as written, but substantial political pressure will exist for Parliament to amend the offending statute (although it is not legally obligated to do so). Thus the courts have a clear duty to prevent violations of the Convention by state actors, although Parliament can in the end insist upon such violations by clearly providing for them in statute.⁷³ So far, the government has always responded to declarations of incompatibility by bringing forward new legislation to remove the incompatibility.⁷⁴

Once invoked, Article 14 forbids “unjustified” discrimination by the state on a non-exhaustive list of grounds that includes race and religion.⁷⁵ Direct discrimination

⁷² *Id.*

⁷³ See, eg, Francesca Klug, *The Human Rights Act—A “Third Way” or “Third Wave” Bill of Rights*, [2001] EUROPEAN HUMAN RIGHTS L REV 361;

⁷⁴ For discussion, see R. Masterman, ‘*Interpretations, Declarations and Dialogue: Human Rights Protection under the Human Rights Act and Victorian Charter of Rights*’ [2009] PUB. LAW. 112.

⁷⁵ *Belgian Linguistics* (1968) 1 EHRR 252, 283.

constitutes treating one group less favourably than an analogous comparator (disparate treatment). But crucially, Article 14 has also been interpreted as prohibiting what is termed “*indirect* discrimination”, or disparate *impact*: this occurs where an apparently neutral measure has the effect of disadvantaging a particular group or where it fails to treat differently a person who is relevantly different.⁷⁶ An example of the former would be a rule that all police officers must be over, say 5’7”. This is neutral on its face, but clearly more women would be unable to fill the requirement than men; consequently the requirement indirectly discriminates against women. An example of the latter would be affording time off to employees for Christian religious holidays without making adjustments for non-Christians whose holidays fall on different days. Crucially, under Article 14, it is not necessary for a claimant to show a discriminatory motive, although motive can affect whether the discrimination is justified.⁷⁷ It suffices that the differential treatment or impact was in fact caused by the impugned characteristic (in other words, that it would not have happened without it). But showing what lawyers term *prima facie* discrimination in this way is only the first step. The question then becomes whether the discrimination can be justified - only unjustified discrimination being unlawful.⁷⁸ Justification depends on whether the challenged measure pursues a legitimate state objective, and is proportionate to that objective.

IV. How Article 14 proportionality should work under the HRA

Proportionality entered into European law through German law, which developed a doctrine of proportionality requiring that state acts or measures be (1) suitable to achieve a legitimate purpose, (2) necessary to achieve that purpose, and (3) proportional in the narrower sense: it must not impose burdens or “cause harms to other legitimate

⁷⁶ *D. H. and Others v Czech Republic* [2007] ECHR 57325/00; *Thlimmenos v Greece* (2001) 31 EHRR 411.

⁷⁷ *R (Gillan) v Commissioner of Police for the Metropolis*, [2006] UKHL 12, para 44

⁷⁸ *Ghaidan v Godin-Mendoza*, [2004] UKHL 30.

interests” that outweigh the objectives achieved by the measure.⁷⁹ This formulation has not been adopted wholesale into the case-law on Article 14, but the last element, “proportionality in the narrower sense,” was incorporated into the Article 14 analysis in the *Belgian Linguistics* case, which was in fact the first mention of the doctrine of proportionality by the European Court of Human Rights in Strasbourg (ECtHR).⁸⁰ The formulation adopted there required “proportionality between the means employed and the aim sought to be realized.”⁸¹ It has subsequently been made clear that this requires the rejection of state-imposed differential treatment that produces “harms to other legitimate interests” disproportionate to the advancement of a legitimate aim secured by the measure.⁸² The case-law of the European Court of Human Rights has identified “social inclusion” and dignity generally, and racial and religious equality specifically, as common interests of the Contracting States of the ECHR.⁸³ Proportionality therefore contemplates a situation in which the harm of a measure, in terms of the extent of invasion of an individual’s rights, or in terms of the damage to common interests in equal dignity and social inclusion, could outweigh the benefits of even a narrowly tailored measure aimed at a compelling interest. Thus, in theory, a profiling policy of searching all people with an Asian appearance carrying a backpack into the London Underground would treat its targets less favourably than similarly situated non-Asians because they were Asian, and would violate Article 14 if the impact of the searches (on the claimants, other Asians, and the interest of social inclusion in general) outweighed the counter-

⁷⁹ Lord Hoffmann, *The Influence of the European Principle of Proportionality upon UK Law*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* (Evelyn Ellis ed, 1999), 107. Lord Hoffmann was a Law Lord in the UK House of Lords, its highest court until the establishment of the Supreme Court in October 2009.

⁸⁰ Marc-Andre Eissen, *The Principle of Proportionality in the Case Law of the European Court of Human Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* (R St J Macdonald, F Matscher & H Petzold eds, 1993), 140.

⁸¹ *Belgian Linguistics* (1968) 1 EHRR 252, para 10.

⁸² *A and Ors v Home Secretary* [2004] UKHL 56, para 50; *Ghaidan v Godin-Mendoza*, [2004] UKHL 30, para 133.

⁸³ *East African Asians v UK* (1973) 3 EHRR, EComHR; *East African Asians v UK*, Application 4403/70 (1995) 19 EHRR CD1, EComHR; *Thlimmenos v Greece* (2001) 31 EHRR 411; *Hoffmann v Austria* 17 EHRR 293.

terrorism benefits of the policy, *even if* the policy was narrowly tailored to pursuing the compelling objective of security from terrorist attack.

UK courts have not always given Article 14 this effect, but there are exceptions. For example, *A and Others v Home Secretary*⁸⁴ concerned a challenge to one of the key ‘preventive’ anti-terrorism measures mentioned above - the 2001 Anti-Terrorism Act which provided for the detention without charge foreign nationals living in the UK whom the Secretary of State believed to be involved in international terrorism and to pose a risk to the national security of the UK. Those detained were suspects who could not simply be deported to their home countries because there was a risk that they would be tortured or executed upon their return, and the Convention itself forbids deporting persons in the face of such a risk. This meant that suspected terrorists who happened to be British nationals were not detained (regardless of the risk they posed), while those without UK nationality, but who could not be deported for fear of torture in their home countries, were imprisoned. In order to impose this burden on liberty in contravention of Article 5 ECHR, the government was required temporarily to suspend the operation of Article 5 on the ground of the “national emergency” it claimed was represented by the global terrorist threat following 9/11 - a process known as “derogation”.⁸⁵ The House of Lords issued a declaration of incompatibility (which ultimately resulted in a change in the relevant law) in part because the mechanism by which the state sought to “narrowly tailor” its interference with rights had impacts that were simply intolerable. Derogation under the circumstances of the case was only allowed to the extent “strictly required” by the emergency.⁸⁶ The Government contended that non-nationals were considered more of a threat, and that therefore the detention of the non-nationals was all that was “strictly required” by the national emergency: detention of British nationals would, it argued, have gone beyond what was “strictly required” by the threat. The House of Lords found that even though the distinction was at face value on the ground of immigration status, not nationality; and even though the distinction was intended to reduce the impact of the measure; and even though as a result of the distinction the measure was as narrowly

⁸⁴ 2004 UKHL 56.

⁸⁵ Under Article 15 ECHR.

⁸⁶ *Ibid.*

tailored to its aim as it could be and still be effective, the invidious effects of treating non-nationals so differently from nationals were simply disproportionate to the counter-terrorism benefits of the scheme.⁸⁷

Even more recently, the House of Lords admitted that UK courts have not been handling proportionality correctly, and admonished them to take more notice of impacts. In *Huang v Home Secretary*⁸⁸ the Lords sought to repair a gap in the leading UK formulation of proportionality. The pre-HRA case of *de Freitas v Secretary of Agriculture*⁸⁹ set out a test of proportionality that courts have been applying throughout the life of the HRA, and it asks,

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.⁹⁰

This formulation of course assumes that if means are “necessary to accomplish the objective,” then they automatically satisfy the proportionality test, however draconian their effects. In other words, the *de Freitas* test does not appear to allow courts to find that even though the measures taken go no further than necessary to further the objective, the damaging effects are simply too grave to allow the measure to pass muster. Unfortunately UK courts have been citing *de Freitas* for years without appearing to notice the missing reference to, well, proportionality (proportionality in the narrower, balancing sense between the need for the measure and the damaging effects it has).

When the discrepancy was brought to their attention in *Huang*, the Lords brusquely acknowledged the mistake:

⁸⁷ *A and Ors* [2004] UKHL 56, para 53. There were other reasons for their Lordships’ findings that the scheme was unlawful.

⁸⁸ [2007] UKHL 11.

⁸⁹ [1999] 1 AC 69.

⁹⁰ *de Freitas* [1999] 1 AC 69 at 80.

This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to...the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. [The House noted that in a previous judgment it had said] that the judgment on proportionality:

"must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage."

‘If, as counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good.’⁹¹

As correct as it clearly is, this passage treats the absence of an “overriding requirement” of proportionality from a “widely cited and applied” test as if it requires nothing more than a quick reminder to the courts not to do it again. The opinion says nothing about how the proper balance should be struck, leaving doubt that any great sea change has occurred.

Skepticism about the Lords’ commitment to weighing impacts stems from more than the fact that they stopped short of providing guidance on what to weigh, how to assign values, and how to strike the balance.⁹² In another recent case, involving the right to religious freedom under Article 9 ECHR, the Lords made similar statements, striking the perfect note about proportionality, and then proceeded to apply it without any mention of the impacts of the alleged discrimination. In *R (SB) v. Governors of Denbigh*

⁹¹ *Huang v Home Secretary* [2007] UKHL 11, [19].

⁹² The case involved instructions to the Immigration Appeal Tribunal on how to review immigration decisions. The opinion urged the tribunal carefully to consider the petitioner’s evidence, indicating that this could be decisive. However, the opinion offers no help on how to apply the principle of proportionality *stricto sensu*.

High School,⁹³ the leading judgment reminded courts that when they reached the proportionality part of the analysis, they must not merely examine whether the decision-maker performed the correct inquiry, they must perform it themselves:

The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time. Proportionality must be judged objectively, by the court. As [Paul] Davies observed in his article cited above, "The retreat to procedure is of course a way of avoiding difficult questions". But it is in my view clear that the court must confront these questions, however difficult.⁹⁴

Having thus paid his respects to the importance of impacts, Lord Bingham then proceeded to reject the Court of Appeal's finding of a violation of Article 9, relying exclusively on the persuasiveness of the reasons in support of the challenged measure⁹⁵ without ever going on to examine the *impact* of the disputed measures on those affected by them. *Huang* and *Denbigh* are of course only the most recent installments in a long line of cases in which appellate courts intone the talismanic words for the benefit of lower courts, without actually getting their hands dirty with the claimant's side of the analysis.

Although all of the foregoing House of Lords pronouncements illustrate the difference in potential between proportionality and strict scrutiny, they do not demonstrate the true potential of proportionality. For example, the impact upon terrorist suspects of detention without trial in *A and Ors* was easy for the Law Lords to understand. They did not need social sciences literature to prove to them that incarcerating non-nationals while letting similarly situated nationals go free brought the law into disrepute, violated compelling interests in equality and social inclusion, and very probably created resentments among resident non-nationals. They were directed by proportionality to give the impacts a weight, and to balance them against the benefits, so

⁹³ [2006] UKHL 15.

⁹⁴ Ibid. at [30] (internal citations omitted).

⁹⁵ Ibid at [30]-[34] (the other members of the majority followed suit).

they gave the impacts the substantial weight they obviously deserved. But for proportionality to come fully into its own, courts must be open to having non-obvious impacts proved to them by expert evidence.

Human rights advocates in the UK must force the impact side of proportionality into the forefront of the jurisprudence of Article 14. The proportionality rubric provides a basis for demanding that courts not only recognise that impacts can outweigh even well-intentioned and narrowly tailored laws, but that they pay as much attention to assigning a fair weight to those impacts as they currently do to assessing the quality of challenged legislation. Article 14's character as a protective, as opposed to prosecutorial, anti-discrimination provision is well established.⁹⁶ This attribute, coupled with a robust application of proportionality, makes Article 14 capable of reaching any situation where state action has the effect of exposing people to different treatment because of their race or religion, and can in effect set the level of scrutiny to which the state measure will be subjected on a case-by-case basis, depending not on a one-size-fits-all suspect classification, but on the impacts of the discriminatory measure.⁹⁷

V. Protection and Proportionality v Prosecution and Strict Scrutiny

Nothing in the language of the Equal Protection Clause would lead one to suspect that it offers any less protection from discrimination than Article 14. However, US courts have chipped away at the EPC by, among other things, requiring proof of the actual intention

⁹⁶ *Thlimmenos v Greece* (2001) 31 EHRR 411; *Petrovich v Austria* (1998) 33 EHRR 307; *Gaygusuz v Austria* (1997) 23 EHRR 364; *Belgian Linguistics* (1968) 1 EHRR 252. See also, DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES (2nd ed, 2002) 144; Stephen Livingstone, *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights*, 1 EUROPEAN HUMAN RIGHTS L REV 25, 32-33 (1997); STEPHEN GROSZ, JACK BEATSON, & PETER DUFFY, HUMAN RIGHTS: THE 1998 ACT AND THE EUROPEAN CONVENTION (2000), paras C14-20-C14-23.

⁹⁷ We leave it for another paper to explore the potential under Article 14 for some uses of profiling to be *more* likely to pass muster than under the EPC, because the impact is sufficiently light as to be outweighed by less than a compelling state interest.

to target a particular racial or religious group for less favourable treatment.⁹⁸ The Supreme Court, in *McCleskey v Kemp*⁹⁹ and *United States v Armstrong*,¹⁰⁰ has established that before strict scrutiny can apply, the claimant must prove *intent to discriminate* on a suspect ground. Those two cases are often remembered for their refusal to accept statistics as proof of racial discrimination under the EPC. However, both actually allowed that the right kind of statistics in the right kind of case could prove *intent to discriminate*.¹⁰¹ More recent cases have followed this to find, for example, that statistics can prove a purpose to discriminate in stops and searches of motorists when (a) the statistical proof demonstrates a “stark pattern” of disparate treatment by race and (b) the police cannot prove any other reason for the statistically proven disparity.¹⁰² As positive as this development surely is, it fails to get a purchase on so-called intelligence-led policing. Police might claim that, for example, the disproportionate stopping of South Asians or Arabs was explained by the fact that they matched the intelligence estimate of likely perpetrators of terrorist acts. This is precisely the kind of reason that can rebut the inference of discrimination generated by statistics: it demonstrates an intent other than the intent to discriminate on the basis of race. In other words, it is the fact that proof of discriminatory intent is required to establish *prima facie* discrimination (as opposed to taking account of intent in the application of strict scrutiny) that excuses intelligence-led policing from scrutiny under the EPC.

This is an important distinction in relation to Article 14, which will require a justification involving “very weighty reasons” as long as the facts disclose (1) that like cases were treated unlike or (2) that unlike cases were treated alike, and (3) that ‘but for’

⁹⁸ See, eg, *Washington v Davis*, 426 US 229, 239 (1976).

⁹⁹ 481 US 279, 292-293 (1987) (holding that statistical proof of a strong correlation between race and subjection to the death penalty could not support an inference of discrimination in the absence of proof that “the decision makers in [this] case acted with a discriminatory purpose”).

¹⁰⁰ 517 US 456, 458-459 (1996) (finding that proof that every person prosecuted for the relevant offence in the relevant year was African-American could not furnish evidence of discriminatory prosecution, in the absence of proof that at least one similarly situated white person was not prosecuted).

¹⁰¹ See, eg, *McCleskey* 481 US at 293-294.

¹⁰² *New Jersey v Pedro Soto* 324 N.J Super 66, 83-84 (1996) (this New Jersey state decision relied on Equal Protection Clause jurisprudence, specifically *McCleskey*).

the race or religion of the claimant the less favourable treatment or impact would not have occurred.¹⁰³ Under the EPC jurisprudence, if a state entity acted reasonably, and without discriminatory intent, the unequal or discriminatory impact is irrelevant. This means that there are cases Article 14 can reach that the EPC cannot, regardless of whether proportionality is stronger than strict scrutiny.

For example, in *United States v Travis*, the Sixth Circuit US Court of Appeals held that where law enforcement officers use race as one of a list of criteria on the basis of which to decide whom to interview, no EPC implications arise: “when officers compile several reasons before initiating an interview, as long as some of those reasons are legitimate, there is no Equal Protection violation”.¹⁰⁴ The court in essence viewed the police as not intending to distinguish on the basis of race, but on the basis of satisfying a profile sincerely calculated to narrow down the field of suspects. The fact that white individuals who met all of the criteria other than race would not be interviewed eluded the EPC analysis altogether. Under Article 14, however, that fact would lead to the conclusion that the state conduct at issue resulted in less favorable treatment on the ground of race, and must be justified.¹⁰⁵

A more powerful illustration of the full potential of Article 14 is provided by *Brown v City of Oneonta*,¹⁰⁶ where the Second Circuit US Court of Appeals held that no race discrimination had occurred when the police used race as part of a purportedly neutral policy of stopping and searching persons who matched an eyewitness description. The police in a small college town had an eyewitness account to the effect that a burglary had been committed by a young, African-American male, who allegedly received a wound to the hand in a struggle with the victim.¹⁰⁷ The police reacted by interrogating every black student in the local college (roughly 75) and “stopping and questioning non-

¹⁰³ *Comparison, supra* n 2 ; *East African Asians v UK* (1973) 3 EHRR, EComHR; *East African Asians v UK*, Application 4403/70 (1995) 19 EHRR CD1, EComHR; *Thlimmenos v Greece* (2001) 31 EHRR 411.

¹⁰⁴ *United States v Travis*, 62 F3d at 174.

¹⁰⁵ See, eg, *A and Ors* [2004] UKHL 56, para 53.

¹⁰⁶ 221 F3d 329 (2d Cir 2000).

¹⁰⁷ 221 F3d at 334.

white persons on the streets and inspecting their hands for cuts”.¹⁰⁸ The litigation arose from outraged African-American residents of the town who complained that the whole investigation was a massive violation of their civil rights. The US Court of Appeals for the Second Circuit, however, ruled that the entire incident arose from the use by the police of a race-neutral policy: “to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description.”¹⁰⁹ Thus the fact that “but for” their race the claimants would not have been interrogated or stopped and searched (for cuts) did not prove discrimination in the absence of evidence that there was a racial motive behind the policy. As a result of the finding that no race discrimination had occurred, no strict scrutiny was applied, with the predictable result that no violation of the EPC was found.

It should be clear by now that under Article 14, a justification incorporating proportionality would be required on the facts of *Brown v City of Oneonta*.¹¹⁰ Because white people, similarly situated in every relevant respect (young, male, and walking down the street or young, male, and attending the local college) were not stopped, examined or interrogated, and because the claimants would not have been treated less favourably than those white people but for the fact that they were black, *prima facie* discrimination would have been established, and Article 14 would call for a justification of the state action.¹¹¹ But the difference between the two approaches does not stop here.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 337.

¹¹⁰ That is, assuming that provided that the interrogations, detentions, and physical examinations were found to involve rights to privacy or liberty, that is, other rights protected under the Convention. (It will be recalled that Article 14 only guarantees non-discrimination *in the exercise of another Convention right*). In *R (Gillan) v Commissioner of Police for the Metropolis*, [2006] UKHL 12, paras 25, 28, 44 the UK House of Lords found that a stop and search, even if it lasted for several hours, did not necessarily violate the Article 5 right to liberty or the Article 8 right to privacy, but specifically noted that discriminatory stops and searches would be another matter (which the judges reserved for a more appropriate case).

¹¹¹ *Comparison, supra* n 2.

Even had strict scrutiny under the EPC been applied,¹¹² the policy would almost certainly have been found to satisfy it; in contrast, the blanket stopping and interrogation of young black men could well have been found to offend the principle of proportionality and thus fallen afoul of Article 14, were a similar policy have been challenged under the Convention in a European state. .

This point is well illustrated by Bernard Harcourt's strong critique of the reasoning in *Oneonta*. Harcourt takes the court to task for assuming that a profile based on eyewitness testimony differs in kind, rather than degree, from a profile based on, for example, an alleged statistical probability that a Muslim or South Asian man is more likely to be planning a terrorist attack than other people entering an Airport. In either case, he observes, the law enforcement officers consciously use the race of targets as a reason to stop and interrogate them, and the eyewitness case differs only because the police employed an arguably more valid predictor: the witness's claim that the burglar was black versus official intelligence that putative terrorists are Muslim or Asian.¹¹³ Harcourt argues that the court should have treated the case as one of race discrimination requiring strict scrutiny. Tellingly, however, he appears to assume that the mass stops and interrogations in *Oneonta* would have satisfied strict scrutiny. His quarrel was not with the result, but with how the court got there. His claim was that the extent to which a particular kind of information "narrows down the suspect pool" is a matter of the effectiveness of the measure, and whether it is "narrowly tailored" to achieving the compelling state interest. If it reliably and significantly narrows the pool, it is narrowly tailored to its objective. This is consistent with the orthodox approach under the EPC, which does not take into account the extent of the impact of the measure as a separate consideration. The requirement that a measure be narrowly tailored takes impact into account, but only insofar as it can be shown that the state could achieve its aim with less impact, and thus that the challenged measure was not, in fact, narrowly tailored. The *Oneonta* profile could satisfy strict scrutiny because (1) there were only four pieces of

¹¹² It was not in *Brown* itself, because the claimant failed at the first stage – no *prima facie* discrimination was found and thus the state was not called upon to justify it under the strict scrutiny test.

¹¹³ Harcourt, *supra* n 54, 1345.

information offered in the eyewitness statement (young, black, male, cut), (2) using these would narrow down the field significantly, (3) dropping any one of the traits from the list would render the profile ineffective, and (4) not searching everyone who had the relevant characteristics would not be effective. The state could not more narrowly tailor its investigative technique and still retain its effectiveness in pursuing the compelling state interest in apprehending burglars.¹¹⁴

Unfortunately, nowhere does the EPC jurisprudence require the court to ask if the impact was so unacceptable that the state should drop the technique altogether. A different US court might well be moved by the breadth and notoriety of the investigatory sweep to rule that the plan was not narrowly tailored to the objective of catching the alleged burglar. However, the logic would be strained. What is it about the challenged investigation that did not “fit” the interest of crime prevention? If the interests of society required that the burglar be apprehended, and there was not a single lead other than the race, gender, age, and wounding of the suspect (and assuming there were good reasons to believe that the burglar came from and remained in the vicinity), the method seems to fit the objective like a glove.¹¹⁵ The police could not very well check just half of the young black men because that could easily deprive the investigation of 100% of its effectiveness.

One could argue that the impacts of the mass interrogations would undermine future law enforcement efforts and thus were not narrowly tailored, but that is a fudge: what really bothers one about the case is not one’s fear for the future success of law enforcement but the simple, gut-level wrongness of treating every young black man in a small American town as a potential criminal. The act itself is just so blunt and divisive, so destructive of social inclusion for reasons unconnected to law enforcement objectives,

¹¹⁴ But see Albert W. Alschuler, *Racial Profiling and the Constitution* 2002 U CHI. LEGAL F. 163, 184 (2002), arguing that calling the *Oneonta* sweep “narrowly tailored” would not “survive the laugh test” (ie, judges would laugh out loud if presented with the claim). The tone of Alschuler’s discussion suggests that he really means that it *should not* survive the laugh test, but I contend that in the hands of the same judges who found the sweep not to amount to discrimination, a finding of narrow tailoring is not even a stretch.

¹¹⁵ See, eg, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse* 48 UCLA L REV 1075, 1082, 1108-1124 (2001).

that it simply should not be tolerated. The need, imposed by the EPC rubric, to weave such intolerable impacts into the narrow tailoring analysis requires sympathetic courts to engage in embarrassing pettifoggery to get to the “right” result, and allows unsympathetic courts simply not to see the problem.

An EPC analysis performed by the US Supreme Court as currently constituted could quite easily wave the *Oneonta* investigation through strict scrutiny, assuming that there really were no less restrictive means of pursuing the investigation effectively, and of taking useful advantage of the eyewitness account. And of course, in fact, it never got to strict scrutiny because somehow separating black students out from white classmates in identical situations in every respect except skin colour was not found to amount to *prima facie* racial discrimination under the EPC. In contrast, Article 14 would have found discrimination in such a situation, and required the state to proffer a proportionality justification complete with “weighty reasons”. This proportionality justification should fail because the impact, on individual rights, group rights, and society in general, of interrogating every young black man in a small American town simply outweighs the state’s interest in catching one small-time burglar. Proportionality would not treat all policing objectives as having the same “compelling” weight, but would ask on a case by case basis whether the law enforcement aim at issue justified the burden imposed. This analysis could take into account evidence of inflated perceptions of risk, which might undermine state claims of a compelling need for action. Following that rubric even the *Oneonta* court would find it hard to conclude that the need to find people to question about a thwarted burglary outweighed the social and individual impacts of the police’s sweep of the town.

VI. Conclusion

Law enforcement efforts to uncover terrorist plots and to prevent terrorists from bringing weapons or explosives into public places or transportation networks can always be characterized as pursuing a “compelling state interest”. The fact that counter-terrorism officers have so few avenues for identifying who might perpetrate these acts means that police will often have no effective alternative means of pursuing that interest

other than, for example, stopping and searching young, South Asian or obviously Muslim men carrying backpacks into the London Underground. In the face of this kind of challenge the Equal Protection Clause seems a very crude tool. Once the state's objective clears the one-size-fits-all "compelling" threshold, it triggers a one-sided "narrowly tailored" analysis which scrutinizes the measure or act only from the perspective of the state or the police, offering no place in its framework for a nuanced balancing of the interests of the state against the interests of affected minorities and against burdens on the social fabric. A finding that the need to fight terrorism is "compelling" fails adequately to reflect the atmosphere in which inflated perceptions of risk can make a variety of hastily conceived and ill-considered measures appear compelling. The Equal Protection Clause as currently applied simply has no way to deal with regulatory or enforcement distinctions driven by (at least consciously) neutral but overblown intentions, that nevertheless cause individuals or groups to experience unequal treatment under the law.

By comparison, Article 14 of the ECHR seems custom made to tackle racial and religious profiling in a counter-terrorism context. It applies to any state distinction that burdens the equal *enjoyment* of rights, regardless of government intention. It can prohibit as unjustified the use of hysterical, unimaginative, or insensitive law enforcement techniques whose social costs outweigh their counter-terrorism benefits, even if they are the only, and thus by definition the least restrictive, techniques the police can think of. In short, if the evidence in a given case supports a finding that using a generalized racial profile in a given case overestimates the threat, only modestly advances law enforcement aims, and profoundly undermines social inclusion, Article 14 allows the courts to tell the police that if they can come up with nothing better than to stop and search every young Arab or South Asian man then they must search everyone until they think of something more effective and less divisive.¹¹⁶

¹¹⁶ See, eg, *A and Ors* [2004] UKHL 56.